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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM E. MURRAY, individually and as Indiana Commissioner of Mental Health; J. ERIC HELMER, individually and as Superintendent of Central State Hospital; and ROBERT C. ROEDER, individually and as Indiana State Personnel Director,

Petitioners,

v.

ROSITA L. CUA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINLEY E. PEARSON
Attorney General of Indiana

ROBERT S. SPEAR
Deputy Attorney General

ROBERT F. HASSETT
Deputy Attorney General

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6336

Attorneys for Petitioners.

Central Publishing Company, Inc., Indianapolis, IN 46206

QUESTIONS PRESENTED

1. Whether a State of Indiana probationary employee can automatically acquire permanent merit status resulting in a property interest protectible under the Due Process Clause of the Fourteenth Amendment without having successfully completed the working test period and without having been certified for permanent merit status by the appointing authority.

2. Whether requiring the State of Indiana to reinstate an unsatisfactory State probationary employee is an impermissible intrusion into the unfettered discretion of the State's personnel decision-making, and, therefore, in conflict with *Bishop v. Wood.*

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v.

ROSITA L. CUA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, William E. Murray, J. Eric Helmer, and Robert C. Roeder, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 20, 1981, which reversed the judgment of the

United States District Court for the Southern District of Indiana, Indianapolis Division, and remanded the cause for further proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in its unpublished per curiam Order which appears in the Appendix hereto at page A-3-A-7. The Findings of Fact of the District Court are appended at pages A-9-12, of the Appendix, and the Conclusions of Law of the District Court are appended at page A-13 of the Appendix. The judgment of the District Court appears at page A-14 of the Appendix.

JURISDICTION

The Judgment and Order of the Court of Appeals for the Seventh Circuit were entered on February 20, 1981. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides as follows:

> ...nor shall any state deprive any person of life, liberty or property, without due process of law;...

The Appendix hereto contains provisions of the State Personnel Act as set forth in the following statutes in the Indiana Code (Burns 1974): at page A-15, the provisions of 4-15-2-1; at page A-15, the provisions of 4-15-2-3; at page A-17, the provisions of 4-15-2-4; at page A-18, 4-15-2-12; at page A-19, the provisions of 4-15-2-19; at page 17, the provisions of 4-15-2-6 at page A-18, the provisions of 4-15-2-7; at page A-19, the provisions of 4-15-2-21; at page A-21, the provisions of 4-15-2-23; and at page A-21, the provisions of 4-15-2-34.

The Appendix contains provisions of Personnel Board Rules as set forth in the following rules in the Indiana Administrative Rules and Regulations (Burns 1976): at page A-22, the provisions of (4-15-2-3)-1, Personnel Bd., Rule 1, §1-1; at page A-23, (4-15-2-19)-3, Personnel Bd., Rule 7, §7-3; at page A-24, (4-15-2-21)-1, Personnel Bd., Rule 8, §8-1; at page A-24, (4-15-2-21)-2, Personnel Bd., Rule 8, §8-1; at page A-24, (4-15-2-21)-2, Personnel Bd., Rule 8, §8-2; at page A-24, (4-15-2-21)-3, Personnel Bd., Rule 8, §8-3; at page A-25, (4-15-2-23)-1, Personnel Bd., Rule 7, §7-6; at page A-25, (4-15-2-23)-1, Personnel Bd., Rule 8, §8-2(C).

The Appendix contains at page A-25, the provisions of Rule 13 of the Court of Appeals for the Seventh Circuit.

The Appendix further contains at page A-26, the provisions of Rule 52 of the Federal Rules of Civil Procedure.

The Appendix also contains at page A-26, the provisions of Appellate Rule 15(N) of the Indiana Rules of Procedure.

STATEMENT OF THE CASE

On February 1, 1977 respondent filed a civil action in District Court under 42 U.S.C. §1983 for damages and injunctive relief. She claimed violation to her free speech, liberty and property interests under the First and Fourteenth Amendments arising out of her discharge without a prior hearing on January 31, 1977 from her State employment as a staff psychiatrist at Central State Hospital. The complaint was amended twice, and by the time the case was tried by the Court on February 4 and 5, 1980 the respondent had withdrawn her free speech and liberty claims and stipulated with petitioners that the case should be tried on the sole issue of whether, at the time of her dismissal, she was a "regular employee" of the State. If she were, it was agreed that under both the Fourteenth

Amendment and the State Personnel Act she would have been entitled to a pretermination hearing.[1]

At the trial the evidence developed the following: pursuant to the State Personnel Act, respondent was employed from August 4, 1972 through February 15, 1976 as a staff psychiatrist, under a durational appointment, at Logansport State Hospital. Under the Act, only the appointing authority at the facility has the power to make appointments in the state merit service. Since respondent had a medical degree[2] and some psychiatric training, she met the minimum qualifications for a durational appointment. However, she lacked a medical license, having failed three (3) times to pass the medical examination. She was permitted to work under a series of temporary physician's permits issued by the Medical Registration Board.

To qualify for a placement on an eligible list as a candidate for permanent employment in the merit service an employee was required to pass an examination which, in the case of respondent's class (Psychiatrist E-1), consisted of an evaluation of her experience and training. If the employee passed, the employee would then become eligible for an open competitive appointment. The employee's name would be placed on the eligible list by the State Personnel Director (Defendant Roeder) and be certified by him as eligible. The eligible list would be submitted to the appointing authority at the given institution who would then appoint or select a name from the list. Such an appointment from the eligible list is called an "open competitive appointment."

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[1]Earlier in the proceedings respondent's Motion for Partial Summary Judgment based on her contention that she was a "regular employee" had been denied.

[2]Respondent was a Phillipine physician who received her medical degree from University of Santo Tomas. No racial animus was claimed in this case.

Upon appointment from the eligible list the employee becomes a probationary employee who must undergo a required working test period of six (6) months. That period may be extended to a maximum of one (1) year (including the required six (6) months) at the request of the appointing authority who has discretion.

To obtain tenure in the state merit service the employee must attain the status of a "regular employee" which means the employee must meet the minimum qualifications for his class, pass the examination, successfully complete the working test period and be granted permanent status by the appointing authority. Only the appointing authority has the power to grant or withhold permanent status. He must certify his decision in writing on the printed form (PD-174) sent to him by the Central Office of the Personnel Department. He cannot act on permanent status until he receives the form. On the form he must certify either that the employee has successfully completed his (her) working test and has been granted permanent status or that the employee's services have not been completely satisfactory and, if applicable, that an extension of the working test is requested for a specified number of months.

In the event the PD-174 is not returned to the Central Office the law provides a penalty: the employee must be taken off the payroll.

On February 8, 1976 the respondent, still lacking a medical license and still in durational status, transferred laterally to Central State Hospital whose appointing authority was Defendant Helmer. On April 8, 1976 the Medical Registration Board issued to respondent a limited medical license which restricted her practice of physchiatry to a mental institution or comprehensive mental health center under close supervision of a licensed psychiatrist. This was the first such license ever issued by the Board, and the Personnel Department seriously doubted whether respondent could be certified for regular

employment with only a limited medical license.[3] The Personnel Department had no previous experience with such a license. The Department submitted the matter to the Governor's office, and on August 24, 1976 that office advised that the Department could place respondent on the eligible list.

Accordingly, on August 31, 1976 respondent's name was placed on an eligible list. She was given a minimum grade of 70 for the examination, and certified as eligible for an open competitive appointment to the position of Psychiatrist E-1. On October 15, 1976 Defendant Helmer certified that he appointed her as an open competitive appointment from the eligible list. The appointment was approved by Director Roeder on October 21, 1976.

In order not to penalize the respondent for the delay in handling the paper work, the open competitive appointment certified by Helmer on October 15 was made effective as of August 31, 1976, the date the eligible list was made.

The required working test period began on August 31, 1976, the date of the appointment. Because of a provision in the law that "time served in duration status, which subsequently results in appointment from an employment list, shall be credited against and deducted from the required working test period", respondent's three and one-half (3½) years in duration status were credited against the required work test period of six (6) months so that in effect her required working test period began and ended on August 31, 1976.

However, under the law, although the appointing authority could have certified the respondent for permanent status as of August 31, 1976, in his discretion he

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[3]For example, a regular employee has the right to apply for transfer to another state agency. With a limited license respondent might be unable to apply for a psychiatrist position in the Department of Corrections.

decided otherwise and when presented for the first time with the opportunity to grant or withhold permanent status he elected not to, and instead he requested three (3) months extension of her working test period. The request was granted. When the first extension was about to expire, he requested a second extension of two (2) months, which was also approved. On January 17, 1977 respondent was notified that her services were unsatisfactory and that she would not be granted permanent status. She was then dismissed as of January 31, 1977.

Defendant Helmer testified that he had never recommended or granted respondent permanent status. No PD-174 form was never submitted showing granting of permanent status. Helmer based his requests for extensions on several factors: (1) the recommendations of the senior psychiatrist who was the licensed psychiatrist appointed as the supervisor of respondent in accord with the requirement of the limited medical license; (2) the recommendations of the person in overall charge of all the services in the building respondent was assigned to; (3) complaints from patients; (4) complaints from staff personnel in respondent's unit; (5) investigations made by Medical Records librarian; (6) Helmer's discussions with respondent and with the Acting Medical Director at the hospital. Helmer further testified that he requested the extensions to give respondent additional opportunity to improve her performance and to demonstrate she could merit permanent status, and that if he had been compelled to make a decision to actually grant permanent status or to discharge her (instead of requested extension of the working test period) he would have been compelled, on the basis of the evaluation of her performance at that time, to discharge respondent.

Roeder testified that in order for an employee to obtain permanent status in the state merit system, the employee must successfully complete the working test period and be actually granted permanent status by the certification of

the appointing authority. Permanent status cannot be acquired automatically. No employee is entitled to permanent status until it has actually been granted.

At the time of her dismissal respondent was earning $1,349.00 bi-weekly for an annual gross salary of $35,074.00.

After hearing all of the testimony, observing all of the documentary evidence, and hearing arguments of counsel Chief Judge William E. Steckler ruled from the bench against respondent and in favor of petitioners. He entered findings of fact that, in substance, recite that as of the date of her dismissal, the respondent was a probationary employee; that she became such on August 31, 1976 on which date she was placed on, and appointed from, the eligible list; that her required working test period of six (6) months begun and ended on August 31, 1976; that the appointing authority requested extensions of time; that the appointing authority never recommended or certified respondent for permanent status; and that at the time of her dismissal she was not a regular employee. Appendix, p. A-9, *set seq.*

He also entered conclusions of law. Appendix, p. A-13. He concluded that respondent had neither been granted permanent status, nor acquired it automatically. That she had no property interest cognizable under due process; and that Defendants did not violate any rights under 42 U.S.C. §1983.

Judgment was entered accordingly. Appendix, p. A-14.

On appeal, the Court of Appeals for the Seventh Circuit reversed and remanded, ordering the district court to hold a hearing to determine the amount of damages in the form of back pay from date of dismissal to date of reinstatement respondent is entitled to, and declaring that respondent is entitled to reinstatement. Appendix, pp. A-2-7.

The Court of Appeals' decision was based on its belief

that the only possible issue in dispute was whether or not respondent had completed her working test period. If she had, according to the Court, she clearly was a regular employee. Appendix, p. A-5. Further, the Court declared that a plain reading of Personnel Board Rule 8, Section 8-2 reflects that a respondent would have had the three (3) years of duration status credited against a working test period and would have, therefore, completed the working test period at the time of her "open competitive appointment." Any finding of fact to the contrary, the Court went on, would clearly be erroneous. Appendix, p. A-6.

It is from the Court of Appeals' ruling that review is now sought.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH SUPREME COURT RULINGS. IN *ROTH, PAUL, BISHOP* AND OTHER CASES BECAUSE THE DECISION IS NOT SUPPORTED BY INDIANA LAW.

A public employee has no Due Process right to a pretermination hearing unless he can demonstrate a property interest in continued public employment. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The genesis of property interests is not in the Constitution but in state law, and the employee must have a "legitimate claim of entitlement" to the continued employment in order to invoke Due Process protection. *Id.* And the sufficiency of the claim must be measured by state law. *Bishop v. Wood*, 425 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) the Supreme Court held that a

property interest attains constitutional status by virtue of initial recognition and protection by state law.

In the instant case the Court of Appeals found that respondent had a property interest in continued employment based upon its analysis of applicable Indiana law. The Court's analysis is not supported by the State Personnel Act and Personnel Board Rules. The Court's conclusions are unreasonable, and its interpretation of Indiana law is erroneous.

In *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962), the Supreme Court stated the traditional standard for statutory interpretation:

> "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence but (should) look to the provisions of the whole law, and to its object and policy.'"

The purposes of the State Personnel Act are set forth in Ind. Code 4-15-2-1 thus:

> "—to increase governmental efficiency, to insure the appointment of qualified persons to the state service—solely on the basis of proved merit..."

This section also states that the personnel system established shall be based on "merit and scientific methods relating to the appointment, compensation...promotion... removal and discipline of employees." Appendix, p. A-15. The "state service" means all employments in certain named institutions, including Central State Hospital and Logansport State Hospital. Ind. Code 4-4-15-2-3(a). Appendix P-A-15, 16. "Class" is defined in (f) as "a group of positions in the state classified service sufficiently alike in duties, authority and responsibility that the same qualifications may be reasonably required for and the same schedule of pay applied to." Appendix, p. A-16, 17.

The "appointing authority" is defined in Ind. Code 4-15-2-3(d) as the one who has the power to make appointments to positions in the state service. Appendix, p. A-16. The Act provides that all appointments to positions in the classified service shall be made on the basis provided in the Act. Ind. Code 4-15-2-4. Appendix, p. A-17. "Classified service" is defined as "all offices and positions of trust and employment in the state service expect those placed in the unclassified service" Ind. Code 4-15-2-3(g). Appendix, p. A-17. Respondent's position was in the classified service.

"Eligible list" means "a list of persons who have been found qualified by an entrance test for appointment to a position in a particular class." Ind. Code 4-15-2-3(j). Appendix, p. A-17.

The definition of "regular employee" is as follows:

> "(n) "regular" employee means an employee who has met the minimum qualifications, passed the examination, completed the working test period and has been certified by the appointing authority for that classification." Ind. Code 4-15-2-3(n). Appendix, p. A-17.

Personnel Bd. Rule 1, §1-1. (z) states the identical definition except the last three (3) words are "the specific classification."

The definition of "regular employee" must be read and construed with other sections and Rules. The definition of "permanent status" is as follows:

> "(AA) "Permanent status" reflects the right or rights granted to an individual who has met the experience and training requirements of the position he occupies, passed the required examination, and *successfully* completed his working test period." Personnel Bd. Rule 1, §1-1, Appendix A-23. (Emphasis added)

A "probationary employee" is defined in (Y) of Rule 1, §1-1 as follows:

"(Y) 'Probationary employee' means an employee serving a working test following appointment from an employment list." Appendix, p. A-23.

Another important section of the Act is Ind. Code 4-15-2-19 which describes the procedure for filling vacancies in the classified service. The procedure clearly spells out that the personnel director certifies to the names of persons who are eligible for appointment to the position in which the vacancy exists. The appointing authority then appoints the person from the list to fill the vacancy. Appendix, p. A-19.

The next step in the procedure is described in Ind. Code 4-15-2-21(a)

> 4-15-2-21 [60-1322]. Working tests required—Test period.—(a) Every persons [person] appointed to a position in the classified service after certification of his name from a promotion list or an eligible list shall be tested by a working test while occupying such position. The period of such working test shall commence immediately upon appointment and shall continue for such time, not less than six [6] months, as shall be established by the director. At such times during the working test period and in such manner as the director may require, the appointing authority shall report to the director his observation of the employee's work, and his judgment as to the employee's willingness and ability to perform his duties satisfactorily, and as to his habits and dependability. At any time during his working test period, after the first two [2] months thereof, the appointing authority may remove an employee, if, in the opinion of the appointing authority, the working test indicates that such employee is unable or unwilling to perform his duties satisfactorily or that his habits and dependability do not merit his continuance in the service. Upon such removal, the appointing authority shall forthwith report to the director and to the employee removed his action and the reason therefor. No more than three [3] employees

> shall be removed successively from the same position during their working test periods without the approval of the director. The appointing authority may remove an employee within the first two [2] months of his working test period only with the approval of the director. The director may remove an employee during his working test period if he finds, after giving him notice and an opportunity to be heard, that such employee was appointed as a result of error or fraud. Appendix, pp. A-19, 20.

Section (b), *Id.* requires the appointing authority to notify the director regarding whether the employee's services have been satisfactory, as follows:

> (b) Ten [10] days prior to the expiration of an employee's working test period, the appointing authority shall notify the director in writing whether the services of the employee have been satisfactory and whether he will continue the employee in his position. A copy of such notice shall be given the employee. No employee shall be paid for work performed after the expiration of his working test period unless, prior to the performance of such work, the appointing authority has notified the director that the employee will be continued in his position. [Acts 1941, ch. 139, §22, p. 387.] Appendix, pp. A-20, 21.

To implement this statute, the Personnel Bd. adopted Rule 8, §8-1. Appendix, p. A-24, which states the objectives of the working test period.

> "The working test period shall be regarded as an integral part of the examination process and shall be utilized for closely observing the employee's work, for securing the most effective adjustment of a new employee to his position, and for rejecting any employee whose performance during the period does not meet required work standards."

Personnel Bd. Rule 8, §8-2, upon which the Court of Appeals based its decision, reads as follows, in relevant part:

(4-15-2-21)-2. Working test period—Nature of test.—(A) All appointments and promotions shall be subject to a working test period of six [6] months. The working test period may be extended to any period not to exceed one [1] year by the state personnel director upon request of the appointing authority.

(B) * * * * *

(C) Time served in duration status which subsequently results in appointment from an employment list shall be credited against and deducted from the required working test period.

(D) Persons in agencies made subject to the provisions of the State Personnel Act [Burns' Code 4-15-2-1—4-15-2-46] who have been in the same positions or similar positions six [6] months or more and who have passed noncompetitive qualifying examinations, shall be accorded permanent status in the classifications to which their positions have been allocated immediately upon appointment from the proper eligible list. [Personnel Bd., Rule 8, §8-2, adopted Oct. 28, 1971, filed April 19, 1972.]

The Court of Appeals states that the only possible issue in this case "was whether or not she (respondent) had completed her working test period." This is wholly erroneous. It is clear from the above statutes and rules that mere passage of time does not make one a "regular" employee having permanent status. The working test period must be *successfully* completed! And this means, as is clear from Ind. Code 4-15-2-21, *satisfactory* services, not merely "putting in one's time" as the Court of Appeals seems to suggest. If the mere passage of time were sufficient to constitute an employee a "regular" employee, the requirements of 4-15-2-21 imposed upon the appointing authority to advise the director in writing of the acceptability or lack thereof of the employee's job performance would be meaningless. If the mere passage of time were sufficient to confer permanent status on a probationary employee, then the merit principle, which is the cornerstone of the Personnel Act, is destroyed.

Rule 8, §8-2 applies only to the required six (6) months working test period in (A) and that the appointing authority retains discretion to extend that period, is the only reasonable interpretation that can be placed on (C).

Rule 52 of the Federal Rules of Civil Procedure states: "Findings of fact shall not be set aside *unless clearly erroneous.*" Without citing any Indiana judicial decision to support its interpretation; without any reasoned analysis embracing other sections of the Personnel Act and other Rules; and without certifying the question to the Indiana Supreme Court, as it could have done, *sua sponte*, under Rule 13 of the Seventh Circuit, (Appendix, p. A-25) and as authorized by Appellate Rule 15 of the Indiana Rules of Procedure (Appendix, p. A-26); the Court of Appeals rejects Judge Steckler's findings on the interpretation of (C) of Rule 8, §8-2.

The Court of Appeals near the close of its unpublished per curiam Order states that appellees (petitioners here) argue on the basis of the Amendment to section (C), Rule 8, §8-2, adopted in 1977. The amended Rule reads as follows:

> "(C) Time spent in duration or provisional status, not to exceed a period equal to the length of the original working test period, which subsequently results in appointment from an employment list shall be credited against and deducted from the required working test period. Personnel Bd., Rule 8, §8-2, adopted October 28, 1971, filed April 19, 1972; as last amended Sept. 15, 1977, filed Nov. 14, 1977." Appendix, p. A-25.

The amendment to section (C) did not change section (C) except to make the meaning more explicit. The deduction or crediting against the required working test period is still six (6) months. The petitioners' argument is the same and is based on the Rules and statutes in existence at all relevant times herein.

Regardless of the use of the words "required" or "original" in conjunction with the working test period,

The Court of Appeals then states that, applying section (C) of Rule 8, §8-2, *supra*, the respondent's duration employment of three (3) years would have effectively caused respondent to have completed, at the time of her appointment from the eligible list on August 31, 1976, not only the required six (6) months period mandated by section (A) of the Rule, but also any extensions which the appointing authority, in his discretion, might wish to exercise, as indeed defendant Helmer decided to in respondent's case.

Such an interpretation simply cannot be a valid and reasonable one. First, section (C) clearly states that the duration status time shall be credited against the *required* working test period. The only required working test stated in this Rule appears in section (A). Six (6) months is the minimum required of any appointee. In the discretion of the appointing authority, that period may be extended by him to a *maximum* of one (1) year. Had the Legislature intended that the duration time be credited against the maximum, they could have so legislated. They did not. Second, it is unreasonable to conclude that the Legislature intended, in the case of a durational employee, to divest the appointing authority of his discretion to extend the working test period to a total of one (1) year, including the required six (6) months.

In substance, the Court of Appeals has done just that in catapulting, if the Court please, the respondent from durational status to permanent status in one day, August 31, 1976, without requiring her to actually undergo a working test period. Had the Legislature intended such a transition to be possible, they would have so legislated. They have not.

The Court of Appeals states that "any finding of fact to the contrary would be clearly erroneous." Appendix, p. A-6, The findings of Chief Judge William E. Steckler, who was appointed to the Federal bench in Indianapolis in 1950 and has the longest tenure of any Chief Judge presently sitting, are reasonable findings. His construction that (C) of

completion of the period does not grant regular or permanent status *until the appointing authority so certifies.* The definition of "regular employee" requires certification by the appointing authority for the specific classification. This requirement follows the words "completed the working test period," and obviously refers to the final step in making the employee a "regular employee", namely, to grant permanent status.

In the case at bar, the appointing authority never granted that status to respondent. No document and no testimony at any stage of the proceedings has shown the granting of permanent status. Without it, respondent cannot claim validly then, or now, that she was entitled, as a "regular employee" is, to Due Process protection prior to termination. Respondent did not meet the applicable criteria required for attainment of permanent or regular employment in the Indiana merit service.

Nor is there, as respondent claimed, any concept of automatic permanent status applicable in her case. The Court of Appeals cited no Indiana law to show that a State probationary employee is automatically entitled to permanent status even though the employee has not successfully completed the working test period and has not been certified by the appointing authority. In fact, section (b) of Ind. Code 4-15-2-21 provides insight into the legislative intent as to the consequence of an appointing authority's failure to notify the director in writing that the employee will be continued in his position: the employee shall not be paid for work performed after the expiration of the working test period. In short, the employee is to be taken off the payroll! Permanent status is definitely not the consequence.

There is no prescriptive right to tenure in Indiana public employment, unless the statute so provides. The Court of Appeals cited none. And it is clear that, absent controlling legislation, a probationary employee has no right to a Due Process hearing. In *State, ex rel. Indiana State Employees'*

Association, Ind. App., 396 N.E.2d 422 (1979), rehearing denied February 4, 1980, transfer denied July 1, 1980, the Court of Appeals, Second District stated:

> "The Indiana courts have clearly distinguished between probationary and permanent employees stating that unless specifically provided for by statute or rule or regulation, probationary employees are not entitled to a Due Process Administrative hearing. *Gansert v. Meeks* (1979), Ind.App., 384 N.E.2d 1140; *Town of Speedway v. Harris* (1976), Ind.App., 346 N.E.2d 646."

Respondent was a probationary employee. She was serving in a working test period the extension of which had been requested by her appointing authority. At the time of her dismissal, she was still in that status. The appointing authority had the unfettered discretion to withhold permanent status from her, which he did. No appeal or hearing was provided by statute in connection with the exercise of his discretion. She clearly had no property interest, under Indiana law, in her continued employment.

Since deciding *Bishop v. Wood*, *Board of Regents v. Roth* and *Paul v. Davis*, *supra*, the Supreme Court has focused increasingly on the requirement that a person seeking constitutional protection for a property interest must show that his expectancy is rooted in state law, that is, in positive state enactments. As the Seventh Circuit stated in *Confederation of Police v. City of Chicago*, 547 F.2d 375 (1977),

> "In *Bishop v. Wood*, the Supreme Court held that the existence of a property interest in public employment cognizable under the due process clause depends on whether state law has affirmatively created an expectation that a particular employment relationship will continue unless certain defined events occur," citing also *Paul v. Davis*, *supra*.

In *Confederation* a Chicago police employee organization challenged the failure of the Chicago Police Department to provide grievance machinery respecting adverse job action

short of discharge, with the result that patrol officers were subject to change in work schedules, assignments, et cetera without explanation or review.

The district court dismissed the complaint, but on appeal, the Seventh Circuit reversed on the ground that Due Process required the Police Department to use a written grievance procedure in taking adverse job action short of discharge. The Court said an Illinois statute was the source of the patrol officer's entitlement to a particular situation or job. That statute, however, was limited by its own terms to discharges or suspensions.

The Supreme Court granted certiorari, and remanded the case for consideration in the light of *Montanye v. Haymes*, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed. 2d 466 (1976); *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976); and *Bishop v. Wood, supra.*

On remand the Seventh Circuit found there was "no Illinois law, whether from a statutory, regulatory, or judicial source, that protects a Chicago patrol officer from adverse action short of discharge or suspension by the Police Department." Then at p. 376 the Seventh Circuit stated:

> "Absent affirmative recognition in Illinois law of an entitlement to particular job conditions, plaintiff's due process claim must fail."

The Court then affirmed the judgment of the district court.

Montayne and *Meachum* were cases involving transfers of state prisoners without a hearing to less desirable prisons. The Supreme Court held in *Montayne* 96 S.Ct. at p. 2547:

> "...our decision in *Meachum* requires reversal in this case. We held in *Meachum v. Fano*, that no Due Process Clause liberty interest of duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation

> *rooted in state law* that he will not be transferred except for misbehavior or upon the occurrence of other specified events." (emphasis added)

Here, as in *Confederation*, there is no affirmative Indiana law that declares a probationary state employee can acquire automatic permanent merit status absent successful completion of the working test period and certification of that employee for permanent status by the appointing authority. Thus, the Due Process protection of the Fourteenth Amendment cannot, petitioners submit, extend to the respondent's expectancy of continued State employment. Her expectancy is not rooted in affirmative state enactments or judicial interpretations of those enactments, as required by *Roth*, *Paul*, *Wood*, *Montayne* and *Meachum*, supra, and in *Confederation*, supra.

Hence, respondent had no protectible property interest requisite to invoke procedural Due Process as none existed in her situation under Indiana law.

II. THE DECISION BELOW ADVERSELY IMPACTS THE PUBLIC INTEREST, THE STATE MERIT SERVICE, THE STATE TAXPAYERS, AND THE UNFETTERED DISCRETION OF STATE PERSONNEL DECISION-MAKING, THEREBY CONFLICTING WITH *BISHOP V. WOOD.* AND *KEIM V. UNITED STATES.*

The decision below, if permitted to stand, will be likely to impact adversely upon many groups of people in Indiana. More than any other time in our recent national history the public is currently demonstrating a monumental concern with the cost of government at every level. Equal concern is shown with the efficiency of public employees. The trend has been to move away from patronage employment and toward merit service in which only qualified, competent persons are employed, at least in those positions in merit service which require special skills and training.

In view of these concerns, the decision below takes on an ominous quality that it might not have had otherwise. The decision awards back pay from date of dismissal to date of reinstatement to the respondent, a former State employee whose appointing authority, in the exercise of his lawful discretion, had determined to be an unsatisfactory State employee and unacceptable for permanent State employment. The court's decision compels the public, in effect, to subsidize substandard performance from a State employee.

Whether the appointing authority's decision to withhold permanent status from respondent was correct is not relevant. What is relevant, petitioners respectfully submit, is that the public's wishes, expressed through the legislature, are nullified by the decision below. The public has vested power and the discretion to go with it in the appointing authority to determine the worthiness of the candidate eligible for permanent status. Ind. Code 4-15-2-21. He alone can grant permanent status. No hearing or appeal is required before or after he exercises his discretion. The working test period undergone by the probationary employee enables the appointing authority to determine the candidate's fitness. Despite the fact that the Court of Appeals did not know the details and facts of the dissatisfaction by patients and staff with respondent's work performance, the Court, nevertheless, pre-judged the merits and held she was entitled to reinstatement.

It seems to the petitioners that the decision below is in conflict with *Bishop v. Wood* in that respect. In *Bishop*, in note 14, the majority stated in 96 S. Ct. at 2080:

> "The cumulative impression created by the three dissenting opinions is that this holding represents a significant retreat from settled practice in the federal courts. The fact of the matter, however, is that the instances in which the federal judiciary has required a state agency to reinstate a discharged employee for failure to provide a pretermination hearing are

> extremely rare. The reason is clear. For unless we were to adopt Mr. Justice BRENNAN's remarkably innovative suggestions that we develop a federal common law of property rights, or his equally far-reaching view that almost every discharge implicates a constitutionally protected liberty interest, the *ultimate control of state personnel relationships is, and will remain, with the States; they may grant or withhold tenure at their unfettered discretion...*" (emphasis added)

Petitioners respectfully submit that the Court of Appeals impermissibly interfered with that unfettered discretion in declaring respondent is entitled to reinstatement.

The rationale for denying such power to intervene is set forth in *Keim v. United States*, 177 U.S. 290, 20 S. Ct. 574, 44 L.Ed. 774 (1890), as follows:

> "The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. *Therefore it is one of those acts over which the courts have no general supervising power.*
>
> "In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment." (emphasis added)

Further, the burden of the cost of back pay must be borne by the taxpayers. At the time of her dismissal, respondent was earning $1,349.00 bi-weekly, gross, for an annual salary of $35,074.00. Her position in the State classified service, Psychiatrist E-1, was among the highest, if not the highest, paid position in the State merit service. If she were reinstated today, she would be paid a bi-weekly salary of $1,588.00 gross for an annual gross salary of $41,288.00. The amount of gross back pay, without deducting for any credits the State can take for her earnings elsewhere

during the relevant period, could reach about $160,000.00. Even by today's inflated prices, that sum is substantial. If she is reinstated, and works until compulsory retirement at age 70, it is conceivable she could earn approximately $700,000.00 for about seventeen (17) years (she is presently about 53 years old), which is a most substantial sum, and one in which the taxpayers of Indiana have reason to be concerned with.

Finally, the impact to the State merit system, which is founded on principles of merit, is likely to be adverse. The purposes of the State Personnel Act "to increase governmental efficiency, to insure the appointment of qualified persons to the state service...solely on the basis of proved merit..." Ind. Code 4-15-2-1 are nullified by the Court of Appeals decision. And the morale of those employees in the permit service who have passed successfully the working test period and been granted permanent status is likely to be impaired as a result of the decision below.

The decision of the Seventh Circuit should, therefore, be reviewed.

CONCLUSION

For the above reason, petitioners urge that a writ of *certiorari* should issue to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

ROBERT S. SPEAR
Deputy Attorney General

ROBERT F. HASSETT
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
(317) 232-6336

Attorneys for Petitioners

APPENDIX

1-A
APPENDIX

Judgment of Court of Appeals
Unpublished Per Curiam Order
JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 20, 1981.

Before
HON. WILBUR F. PELL, JR., Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. ADRIAN A. SPEARS, District Judge*

No. 80-1350

ROSITA L. CUA, *Plaintiff-Appellant,* vs. WILLIAM E. MURRAY, Individually and as Indiana Commissioner of Mental Health; J. ERIC HELMER, Individually and as Superintendent of Central State Hospital; and ROBERT C. ROEDER, Individually and as Indiana State Personnel Director, *Defendants-Appellees.*	) Appeal from the United) States District Court) for the Southern District) of Indiana, Indianapolis) Division.)) No. IP 77-50-C)) WILLIAM E. STECKLER,) *Judge*	

*Honorable Adrian A. Spears, of the Western District of Texas, sitting by designation.

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs; the appellant is entitled to reinstatement to her position; and the cause is REMANDED WITH DIRECTIONS, in accordance with the order of this Court entered this date.

ORDER OF COURT OF APPEALS

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

(Argued January 14, 1981)

February 20, 1981.

Before
HON. WILBUR F. PELL, JR., Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. ADRIAN A. SPEARS, District Judge*

ROSITA L. CUA, *Plaintiff-Appellant,*	) Appeal from the United States District Court for the Southern District
No. 80-1350 vs.	) of Indiana, Indianapolis Division.
WILLIAM E. MURRAY, Individually and as Indiana Commissioner of Mental Health;	) No. IP 77-50-C
J. ERIC HELMER, Individually and as Superintendent of Central State Hospital; and	) WILLIAM E. STECKLER, *Chief Judge*
ROBERT C. ROEDER, Individually and as Indiana State Personnel Director, *Defendants-Appellees.*	)

ORDER

Rosita L. Cua, the Plaintiff-Appellant, alleges that she was terminated from state employment on February 1,

*Of the Western District of Texas, sitting by designation.

1977, without being afforded her constitutionally protected right to due process. At the pretrial conferences, the parties agreed to submit the case to the court on the sole issue of whether or not the appellant was a "regular employee" of the state. If the court determined that she was a regular employee, both parties agreed that she was entitled to a termination hearing which she did not receive, for it is clear that a state cannot, in violation of a state statute, rule, regulation, practice or policy, conferring interest in employment, deprive a citizen of state employment without due process. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The district court found that appellant's rights under 42 U.S.C. §1983 were not violated and entered judgment for the defendants. We disagree.

Appellant was employed as a staff psychiatrist at Logansport State Hospital, Logansport, Indiana, from August 4, 1972, through February 15, 1976. Her employment there was a duration appointment pursuant to the authority of Indiana Code 4-15-2-23(b), and Rule 7, Section 7-6 of the State Personnel Board. In February, 1976, she was laterally transferred, again as a durational employee, from Logansport State Hospital to Central State Hospital. Subsequently, in October of 1976, the appellant was appointed to fill a vacancy, by means of an open competitive appointment, which was effective August 31, 1976. It followed, therefore, that if appellant became a "regular employee" on August 31, 1976, she was entitled to a due process hearing, regardless of any subsequent action by the State Personnel Director, or any subsequent changes in the law. A "regular employee" of the State of Indiana has a right to due process before dismissal from state employment. Indiana Code Section 4-15-2-34; Burns Admin. Rules and Regs. (4-15-2-34)-1.

The rules adopted by the Indiana Personnel Board are reported in Burns Administrative Rules and Regulations, Title 4. Rule 1, Section 1-1, found in Burns Admin. Rules and Regs. (4-15-2-3)-1 contains the definitions for the State Personnel Rules:

> (Z) "Regular employee" means an employee who has met the minimum qualifications, passed the examination, completed the working test period, and has been certified by the appointing authority for the specific classification.
>
> (AA) "Permanent status" reflects the right or rights granted to an individual who has met the experience and training requirements of the position he occupies, passed the required examination, and successfully completed his working test.

One additional term to be considered is "open competitive appointment," which is an appointment of an employee who has met all the requirements of a regular employee and permanent status, except for the completion of a working test period. The Indiana State Personnel Director testified as follows:

> Open competitive appointment is when a person meets the minimum qualifications, has passed the examination, either evaluation of their experience and training or written examination,...and has been selected from an eligible list....

Since appellant received an open competitive appointment, she had met the minimum qualifications, and had passed, in her case, an experience and training examination. Therefore, the only possible issue in dispute was whether or not she had completed her working test period. If she had, then clearly she was a regular employee.

Indiana Code Section 4-15-2-21 provides for a working test period of not less than six months as shall be established by the Director of the State Personnel Division. Rule 8, Section 8-2, Burns Admin. Rules and Regs. (4-15-2-

21)-2, provided that the working test period may not be extended for more than one year, and that time served in duration status shall be credited against the required working test period. At the time pertinent to a determination of appellant's employment, the Rule read as follows:

> Working Test Period—Nature of Test.
>
> (A) All appointments and promotions shall be subject to a working test period of six (6) months. The working test period may be extended to any period not to exceed one (1) year by the State Personnel Director upon request of the appointing authority.
>
> (B) The requirement of a working test period shall be waived in the case of appointment from a reemployment list.
>
> (C) *Time served in duration status which subsequently results in appointment from an employment list shall be credited against and deducted from the required working test period.*
>
> (D) Persons in agencies made subject to the provisions of the State Personnel Act (Burns' 4-15-2-1—4-15-2-46) who have been in the same position or similar position six (6) months or more and who have passed non-competitive qualifying examinations, shall be accorded permanent status in the classifications to which their positions have been allocated immediately upon appointment from the proper eligible list. (Emphasis supplied).

A plain reading of Personnel Board Rule 8, Section 8-2, reflects that a person such as appellant, who had been in duration status for three years, would have such time credited against a working test period, and would, therefore, have completed the working test period at the time of her "open competitive appointment." Any finding of fact to the contrary would, therefore, be clearly erroneous.

The appellees argue vigorously, based upon a subsequent amendment of the Rule, that the crediting rule applies only to the "original" working test period, and not to any extension of a working test period. The rights of an employee, however, are determined by "existing rules or understandings" and not by subsequent changes in the rules. *Perry v. Sindermann, supra, Board of Regents v. Roth, supra.*

The judgment of the district court is hereby REVERSED; the appellant is entitled to reinstatement to her position; and this cause is REMANDED to the district court for a determination of the amount of damages in the form of back pay suffered by appellant from the date of her separation to the date of her reinstatement.

Findings of Fact And Conclusions of Law of the United States District Court for the Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROSITA L. CUA	)	
	)	
v.	)	IP 77-50-C
	)	
WILLIAM E. MURRAY, individually and as Indiana Commissioner of Mental Health,	)	
	)	
J. ERIC HELMER, individually and as Superintendent of Central State Hospital, and	)	
	)	
ROBERT C. ROEDER, individually and as Indiana State Personnel Director	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial in the United States District Court at Indianapolis, Indiana, on the 4th day of February, 1980. The plaintiff appeared personally and by her attorney, Donald A. Schabel and Stephen H. Free. The defendants appeared by their attorneys, Theodore L. Sendak, Attorney General of the State of Indiana, through Robert F. Hassett, Deputy Attorney General of the State of Indiana.

The plaintiff filed this action seeking redress for alleged deprivation of rights secured by the First and Fourteenth

Amendments to the United States Constitution and by 42 U.S.C. §§1983 and 1988, arising from the defendants' termination of plaintiff's employment as a staff psychiatrist in the state mental institution system. The plaintiff sought injunctive relief and damages in the form of reinstatement, back pay, punitive damages, and attorney's fees and costs. After completion of the pleading and pretrial conference stage of the litigation, the parties stipulated to the Court that the sole issue to be tried was whether plaintiff was a "regular employee" as that term is contemplated under the Indiana State Personnel Act. The parties further stipulated that if plaintiff were to be found by the Court to have been a "regular employee," then she was wrongfully denied a hearing required by the Due Process Clause of the United States Constitution and by the Indiana State Personnel Act.

The Court, having heard the evidence and oral arguments of counsel at the close of the trial, and being fully informed in the premises, makes the following findings of fact.

FINDINGS OF FACT

1. The Indiana Department of Mental Health is an agency of state government which has control of and responsibility for all state-owned and operated mental health institutions.

2. Defendant William E. Murray, as Indiana Commissioner of Mental Health, is the chief administrative officer of the Indiana Department of Mental Health. The Indiana Commissioner of Mental Health has administrative control of and responsibility for all state-owned and operated mental health institutions.

3. Defendant J. Eric Helmer, as Superintendent of Central State Hospital, is the "appointing authority" who has the power to make appointments to positions in the

state service at Central State Hospital in accordance with the provisions of the State Personnel Act.

4. Defendant Robert C. Roeder, as Indiana State Personnel Director, administers and enforces the provisions of the State Personnel Act and the rules and regulations thereunder.

5. Logansport State Hospital and Central State Hospital are mental health institutions owned and operated by the State of Indiana and are under the control of the Indiana Department of Mental Health. The manner of employment of personnel at said hospitals is governed by the State Personnel Act.

6. On August 17, 1967, the State Personnel Board adopted a resolution declaring that a general manpower shortage existed in the State and that the Personnel Division was unable to establish and maintain adequate eligible lists for many classes of employment; that the Board declared a state of emergency existed, and that the Board authorized duration appointments in all classes for which eligible lists cannot be established. This resolution was passed pursuant to Ind. Code §4-15-2-23(b) and Rule 7, §7-6 of the State Personnel Board.

7. Plaintiff, Dr. Rosita L. Cua, was employed as a staff psychiatrist on a duration appointment pursuant to the above statute and rule and resolution, at Logansport State Hospital from August 4, 1972, through February 15, 1976.

8. Plaintiff's employment there was governed by provisions of the State Personnel Act and Rules.

9. Plaintiff worked at Logansport under a series of physician's temporary permits authorizing her to work at Logansport State Hospital for designated periods of time, the last of which expired on January 13, 1976.

10. On February 4, 1976, the plaintiff was laterally transferred as a durational transfer from Logansport State Hospital to Central State Hospital.

11. On April 8, 1976, the Indiana Medical Registration Board issued to the plaintiff a limited physician's license limiting her practice of psychiatry to a mental institution or to a comprehensive mental health center, under close supervision of a licensed psychiatrist.

12. On August 31, 1976, the plaintiff was placed on an eligibility list for her classification and was appointed from that list on the same date.

13. On August 31, 1976, with the plaintiff placed on, and appointed from, the eligibility list for her classification, her employment status changed from durational employee to probationary employee.

14. As a probationary employee, plaintiff's required working test period of six (6) months began to run.

15. Since the plaintiff had worked at Logansport as a durational employee for approximately three and one-half (3-1/2) years, the Board credited that period of time against the required working test period so that, in effect, her required working test period both began and ended on August 31, 1976.

16. On October 21, 1976, the Personnel Division mailed to the appointing authority of Central State Hospital, the EWT form (PD-174) requesting evaluation of the plaintiff by the authority.

17. Under Indiana law the appointing authority had the discretion to grant the plaintiff permanent status; to terminate her; or to request an extension of her working test period up to six (6) months.

18. The form mailed by the Personnel Division bore an effective date of 8-31-76. The form indicates that the appointing authority, J. Eric Helmer, requested an extension of the working test period for three (3) months. The form was signed by Helmer and by Dr. Virginia Ramos, the plaintiff's supervisor, who is a licensed psychiatrist. Plaintiff refused to sign.

19. The EWT form was mailed back to the Personnel Division which received it on November 22, 1976, and granted the request. The date 8-31-76 was crossed out by the Personnel Division and a new expriation date for the working test extension was written in, 12-1-76.

20. The EWT form was completed by Eric Helmer and Dr. Ramos on December 3, 1976, and requested an extension of two (2) months. The form was mailed back to the Personnel Division which received it on January 3, 1977, and granted the request. The effective date of 12-1-76 was crossed out and the new termination date of the extension written in by the Board, 2-1-77.

21. On January 3, 1977, the Board mailed another EWT form showing an effective date of 2-1-77.

22. On January 17, 1977, Dr. Ramos and Eric Helmer completed the form which showed that no further extension was being requested and that plaintiff's services were not completely satisfactory. The plaintiff again refused to sign the form.

23. On January 31, 1977, plaintiff was terminated by Eric Helmer.

24. Defendant Helmer never recommended the plaintiff for permanent status, and did not certify her.

25. At the time of her dismissal the plaintiff was not a "regular employee" as defined in the State Personnel Act and Rules.

26. Not being a "regular employee," plaintiff was not entitled to notice, a hearing, and right to appeal as provided by statute.

27. At the time of her dismissal the plaintiff was a probationary employee.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact the Court now makes the following conclusions of law.

1. Plaintiff was never granted permanent status and did not become a "regular employee."

2. Not being a "regular employee," the plaintiff was not entitled to notice, a hearing and right of appeal as prescribed by statute.

3. At the time of her dismissal plaintiff was a probationary employee.

4. The plaintiff did not acquire any automatic permanent status.

5. The plaintiff did not have a property interest in her position that would constitute a legitimate claim of entitlement warranting due process protection.

6. Plaintiff was not deprived of her procedural rights under the Fourteenth Amendment.

7. Plaintiff is not entitled to reinstatement and back pay or any other claim.

8. The defendants followed the statutory procedures at all times.

9. The defendants did not violate any rights under 42 U.S.C. §1983, and were not personally involved in any transaction which she claims deprived her of her rights.

Dated this 11th day of February, 1980.

/s/ WILLIAM E. STECKLER
United States District Judge

Judgment of the United States District Court for the Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROSITA L. CUA	)	
	)	
v.	)	IP 77-50-C
	)	
WILLIAM E. MURRAY, individually and as Indiana Commissioner of Mental Health,	)	
	)	
J. ERIC HELMER, individually and as Superintendent of Central State Hospital, and	)	
	)	
ROBERT C. ROEDER, individually and as Indiana State Personnel Director	)	

JUDGMENT

This matter came on for trial before the Court on February 4, 1980, and the issues having been fully presented and tried, and the Court having entered its findings of fact and conclusions of law this date,

IT IS ORDERED, ADJUDGED and DECREED that the plaintiff take nothing by her complaint and that defendants have judgment for their costs and disbursements herein expended.

Let judgment be entered accordingly.

Dated this 11th day of February, 1980.

/s/ WILLIAM E. STECKLER
United States District Judge

STATUTES

Indiana Code 4-15-2-1 (Burns 1974)

Short title—Liberal construction—Purpose of act—Merit principles.—This chapter [4-15-2-1—4-15-2-46] shall be known and may be cited as the "State Personnel Act," and this chapter shall be liberally construed to effectuate its policies and purposes to increase governmental efficiency, to insure the appointment of qualified persons to the state service hereinafter defined solely on the basis of proved merit, to offer any person a fair and equal opportunity to enter such state service, and to afford the employees in such state service an opportunity for public service and individual advancement according to fair standards of accomplishment based upon merit principles, and to which ends there is by this chapter established a personnel system based on merit and scientific methods relating to the appointment, compensation, promotion, transfer, lay-off, removal and discipline of employees and to other incidents of state employment.

Indiana Code 4-15-2-3 (Burns 1974)

Definition of terms.—As used in this chapter [4-15-2-1—4-15-2-46] and in the definition provided in this section, unless a different meaning appears from the context, the following terms shall have the following meanings:

(a) "state service" means all public services in all offices and employments in the following named institutions and agencies (except members of boards and commissions of the following named institutions and agencies except the chief administrative officer of each of the following named institutions and agencies, but not excepting directors of county departments of public welfare and health officers of local full time health departments): The department of mental health, the Dr. Norman M. Beatty Memorial Hospital, the Larue D. Carter Memorial Hospital, the Central State Hospital, the Evansville Psychiatric Children's Center, the Evansville State Hospital, the Fort

Wayne State Hospital and Training Center, the Logansport State Hospital, the Madison State Hospital, the Muscatatuck State Hospital and Training Center, the New Castle State Hospital, the Northern Indiana Children's Hospital [Northern Indiana State Hospital and Developmental Disabilities Center], the Richmond State Hospital, the division of alcoholism; the state board of health, including local full time health departments participating in state aid, the Indiana School for the Blind, the Indiana School for the Deaf, the Indiana State Soldiers' Home, the Indiana Soldiers' and Sailors' Children's Home, the Southern Indiana Tuberculosis Hospital [Silvercrest Disability and Chronic Disease Facility], the Indiana agency for the blind, the department of correction, the Indiana Boys' School, the Indiana State Farm, the Indiana Girls' School, the Indiana State Prison, the Indiana Women's Prison, the Indiana Reformatory, the Reception Diagnostic Center, the Rockville Training Center, the Youth Rehabilitation Facility, the administrative building council, the Indiana department of civil defense excluding any county civil defense organization and any other local civil defense organization created pursuant to the provisions of IC 1971, 10-4-1 [10-4-1-1—

* * * * *

(d) "appointing authority" means the head of a department, division, board, commission, person or group of persons who has the power by law or by lawfully delegated authority to make appointment to positions in the state service.

(e) "division of the service" means a state department or a division [or] branch thereof, or any agency of the state government, or a branch of the state service, all the positions in which are under the same appointing authority.

(f) "class" or "class of positions" means a group of positions in the state classified service sufficiently alike in

duties, authority and responsibility that the same qualifications may reasonably be required for, and the same schedule of pay can be equitably applied to, all positions in the group.

(g) "classified service" means all offices and positions of trust and employment in the state service except those placed in the unclassified service by this chapter [4-15-2-1—4-15-2-46].

* * * * *

(j) "eligible list" means a list of persons who have been found qualified by an entrance test for appointment to a position in a particular class.

* * * * *

(m) "eligible" means a person whose name is on the reemployment, promotion or eligible list for a given class.

(n) "regular employee" means an employee who has met the minimum qualifications, passed the examination, completed the working test period and has been certified by the appointing authority for that classification.

Indiana Code 4-15-2-4 (Burns 1974)

Appointments—Effect.—All appointments to positions in classified service shall be made on the basis provided in this act [4-15-2-1—4-15-2-46]. The appointment, promotion, demotion, transfer, lay-off, removal and discipline of employees and other incidents of state employment with respect to each division of the service shall be governed by the provisions of this act and every appointing authority shall, in respect to matters of state employment, be governed and limited by the system of personnel administration created by this act. [Acts 1941, ch. 139, §3, p. 387.]

Indiana Code 4-15-2-6 (Burns 1974)

Duties of director—Appointment of deputy, employees and experts—Employee awards system—Reports.—(a) The director shall direct and supervise all

administrative and technical activities. In addition to the duties imposed upon him elsewhere in this chapter [4-15-2-1—4-15-2-46], it shall be his duty:

(1) To attend all meetings of the board.

(2) To establish and maintain a roster of all employees in the state service; to prepare or cause to be prepared and recommend a classification and pay plan; to administer the classification and pay plan; to allocate all positions in the state service to their proper class; to formulate eligible lists; to certify persons qualified for appointment; to certify employees for transfer, demotion, promotion, suspension, lay-off, and dismissal; to rate employees' services; to arrange with heads of the divisions of the service for employee training; and to attend to and perform all other duties imposed by this chapter.

Indiana Code 4-15-2-12 (Burns 1974)

Vacancies in classified service—Emergency appointments.—Vacancies in the classified service shall be filled only by:

(a) appointment from an eligible list certified by the director; or

* * * * *

(c) emergency and duration appointments under section 24 [4-15-2-23] of this act; or

* * * * *

Indiana Code 4-15-2-7 (Burns 1974)

State service—Division into classified and unclassified service.—The state service as defined in this act [4-15-2-1—4-15-2-46] is hereby divided into the unclassified service and the classified service as follows:

(a) The unclassified part of said state service shall consist of the following:

(1) All inmate help in all state penal, charitable, correctional, and benevolent institutions.

(2) One [1] confidential secretary for each chief administrative officer in each of the named state agencies under subsection (a) of sec. 2 [4-15-2-3] of this act.

(b) The classified part of said state service shall include all civil offices and positions in said state service at the time when this act takes effect other than those in the unclassified service: Provided, That this section shall not be construed so as to include in the state service any person or persons, who are excluded in the definition of the term "state service" in paragraph (a) of sec. 2 of this act.

Indiana Code 4-15-2-19 (Burns 1974)

Procedure to fill vacancy in classified service.—Whenever an appointing authority proposes to fill a vacancy in the classified service, he shall submit to the director a statement showing the position to be filled, the duties thereof, and the necessary and desirable qualifications of the person to be appointed thereto, and shall request the director to certify the names of persons eligible for appointment to such position. The director shall thereupon certify to the appointing authority the names of five [5] persons eligible for such position, and if more than one [1] vacancy is to be filled the name of one [1] additional person eligible for each additional vacancy: Provided, That where under any applicable federal law or regulation three [3] names are required to be certified, then the director shall certify to the appointing authority three (3) names of persons eligible for such position. The names certified shall be the highest ranking eligible persons willing to accept employment. Names shall be certified from each list in the order of their rank on that list. [Acts 1941, ch. 139, §20, p. 387.]

Indiana Code 4-15-2-21 (Burns 1974)

Working tests required—Test period.—(a) Every persons [person] appointed to a position in the classified service after certification of his name from a promotion list

or an eligible list shall be tested by a working test while occupying such position. The period of such working test shall commence immediately upon appointment and shall continue for such time, not less than six [6] months, as shall be established by the director. At such times during the working test period and in such manner as the director may require, the appointing authority shall report to the director his observation of the employee's work, and his judgment as to the employee's willingness and ability to perform his duties satisfactorily, and as to his habits and dependability. At any time during his working test period, after the first two [2] months thereof, the appointing authority may remove an employee, if, in the opinion of the appointing authority, the working test indicates that such employee is unable or unwilling to perform his duties satisfactorily or that his habits and dependability do not merit his continuance in the service. Upon such removal, the appointing authority shall forthwith report to the director and to the employee removed his action and the reason therefor. No more than three [3] employees shall be removed successively from the same position during their working test periods without the approval of the director. The appointing authority may remove an employee within the first two [2] months of his working test period only with the approval of the director. The director may remove an employee during his working test period if he finds, after giving him notice and an opportunity to be heard, that such employee was appointed as a result of error or fraud.

(b) Ten [10] days prior to the expiration of an employee's working test period, the appointing authority shall notify the director in writing whether the services of the employee have been satisfactory and whether he will continue the employee in his position. A copy of such notice shall be given the employee. No employee shall be paid for work performed after the expiration of his working test period unless, prior to the performance of such work, the appointing authority has notified the director that the

employee will be continued in his position. [Acts 1941, ch. 139, §22, p. 387.]

Indiana Code 4-15-2-23 (Burns 1974)

Vacancies in classified service.—(a) When an emergency makes it impossible to fill a position in the classified service under any other provision of this chapter [4-15-2-1—4-15-2-46] an appointing authority, in order to prevent stoppage of public business or loss or serious inconvenience to the public, may appoint any qualified person to such position, but notice shall be given of such appointment to the director forthwith. Any such person shall be employed only during such emergency and for a period not exceeding ten [10] days. A vacancy of which the appointing authority has had reasonable notice, or an employment condition of which he had, or might with due diligence have had, previous knowledge, shall not be considered an emergency under which such appointment may be made. No such appointment shall be renewed.

(b) In time of war, state or national disaster, or other conditions causing a general manpower shortage, such a disaster or manpower shortage creating a situation under which the state personnel division finds it impossible to establish eligible lists for lack of recruits, the Indiana personnel board, by resolution, may declare that an emergency exists and may authorize duration appointments to be continued until adequate eligible lists can be established subsequent to the ending of the emergency. Such duration appointments shall adhere to established minimum qualifications in each class. [Acts 1941, ch. 139, §24, p. 387; 1945, ch. 287, §2, p. 1266; 1971, P.L. 35, §12, p. 181.]

Indiana Code 4-15-2-34 (Burns 1974)

Dismissal of employee—Written notice and reasons, answer of employee—Appeal—Reemployment.—An appointing authority or his designee may dismiss for cause any regular employee in his division of the service. No dismissal of a regular employee shall take effect, unless, at

least ten [10] days before the effective date thereof, the appointing authority or his designee gives to such employee a written statement of the reasons therefor and files a copy of such statement with the director. The employee shall have an opportunity to file with the appointing authority a written statement regarding the proposed dismissal, a copy of which shall be filed with the director. A regular employee who is dismissed shall have the right to appeal to the commission provided under section 35 of this chapter [4-15-1.5-1—4-15-1.5-8]. [Acts 1941, ch. 139, §35, p. 387; 1967, ch. 339, §1, p. 1287; 1971, P.L. 35, §14, p. 181; 1973, P.L. 20, §5, p. 72.]

Ind. Admin. Rules and Regs. (State Personnel Board Rules) (Burns 1976)

4-15-2-3. DEFINITION OF TERMS.

(4-15-2-3)-1. Definitions.—As used in these rules, unless the context plainly requires another meaning, the following terms shall have meaning as indicated:

(A) "Act" means the State Personnel Act, IC 1971, 4-15 [Burns' Code 4-15-2-1—4-15-2-46] and any amendments thereto.

(B) "Classified service" means all offices and positions of trust and employment in the state service under the State Personnel Act except those placed in the unclassified service by the act.

(J) "Employment list" means an eligible list, reemployment list, promotional list, or intermittent employment list.

(O) "Duration appointment" means an appointment made during time of war, state or national disaster, or similar circumstances resulting in a general manpower shortage, under the authority of a resolution of the state personnel board authorizing such appointments. To be eligible for a duration appointment the appointee must possess the minimum qualifications for the class to which

he is given a duration appointment but not have successfully completed the required examination. Whenever an eligible list is established for the class in which the duration appointment is made, the duration appointment will be terminated.

(Y) "Probationary employee" means an employee serving a working test following appointment from an employment list.

(Z) "Regular employee" means an employee who has met the minimum qualifications, passed the examination, completed the working test period, and has been certified by the appointing authority for the specific classification.

(AA) "Permanent status" reflects the right or rights granted to an individual who has met the experience and training requirements of the position he occupies, passed the required examination, and successfully completed his working test period. [Personnel Bd., Rule 1, §1-1, adopted Oct. 28, 1971, filed April

(4-15-2-19)-3. Appointment from employment lists—Certification.—When a vacancy occurs in an institution or agency in the classified service, the director shall certify the three [3] highest available names in order of rank from the appropriate list. One [1] additional name shall be certified for each additional vacancy. Beyond the foregoing, additional names will only be certified as replacements for names on the original certification who have declined appointment or who have been passed over by the appointing authority. To pass over a name on the eligible list, the appointing authority must furnish, in writing, a reason sufficient to make possible the removal of such name from the employment list.

All individuals certified as eligible for appointment to the same vacancy shall be offered appointment at the same rate of pay and working conditions. If the state personnel division ascertains that declination of offered appointment is due to variations in offered pay rates or conditions of

employment, the director shall cancel appointment from the names certified. [Personnel Bd., Rule 7, §7-3, adopted Oct. 28, 1971, filed April 19, 1972.]

(4-15-2-21)-1. Working test period—Objectives.—The working test period shall be regarded as an integral part of the examination process and shall be utilized for closely observing the employee's work, for securing the most effective adjustment of a new employee to his position, and for rejecting any employee whose performance during the period does not meet required work standards. [Personnel Bd., Rule 8, §8-1, adopted Oct. 28, 1971, filed April 19, 1972.]

(4-15-2-21)-2. Working test period—Nature of test.—(A) All appointments and promotions shall be subject to a working test period of six [6] months. The working test period may be extended to any period not to exceed one [1] year by the state personnel director upon request of the appointing authority.

(B) The requirement of a working test period shall be waived in the case of appointment from a reemployment list.

(C) Time served in duration status which subsequently results in appointment from an employment list shall be credited against and deducted from the required working test period.

(D) Persons in agencies made subject to the provisions of the State Personnel Act [Burns' Code 4-15-2-1—4-15-2-46] who have been in the same positions or similar positions six [6] months or more and who have passed noncompetitive qualifying examinations, shall be accorded permanent status in the classifications to which their positions have been allocated immediately upon appointment from the proper eligible list. [Personnel Bd., Rule 8, §8-2, adopted Oct. 28, 1971, filed April 19, 1972.]

(4-15-2-21)-3. Working test period—Method of reporting.—One [1] month prior to the end of the six [6]

months' working test, the personnel division will send to the appointing authority an end of the working test report. Prior to the end of the six [6] month period, the appointing authority shall complete the form, recommending permanent status, indicating separation of the employee, or recommending a working test extension of up to six [6] months. Specific reasons for such extension request must be specified on the working test form. [Personnel Bd., Rule 8, §8-3, adopted Oct. 28, 1971, filed April 19, 1972.]

(4-15-2-23)-1. Duration appointment.—(A) A duration appointment may be made to a vacancy in the classified service whenever the board finds through formal resolution there exists a war, or other emergency or a state or national emergency causing a general manpower shortage, which shortage makes it impossible to establish an eligible list in the regular manner.

(B) When an employment list is established with a sufficient number of eligibles to make a complete certification for any position in the classified service currently filled by duration appointment, the appointing authority shall, within thirty [30] days after the date of certification of eligibles, fill the position by appointment from the employment list. [Personnel Bd., Rule 7, §7-6, adopted Oct. 28, 1971, filed April 19, 1972.]

(C) Time spent in duration or provisional status, not to exceed a period equal to the length of the original working test period, which subsequently results in appointment from an employment list shall be credited against and deducted from the required working test period. [Personnel Bd., Rule 8, §8-2, adopted Oct. 28, 1971, filed April 19, 1972; as last amended Sept. 15, 1977, filed Nov 14, 1977.]

Rules of Seventh Circuit

Rule 13. Certification of Questions of State Law

When the rules of the highest court of a state provide for certification to that court by a federal court of questions

arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, *sua sponte* or on motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified. The certification will be made after the briefs are filed in this court. A motion for certification shall be included in the moving party's brief. As amended July 1, 1980.

Federal Rules of Civil Procedure

Rule 52. Findings by the court.—(a)

* * * * *

Findings of fact shall not be set aside unless clearly erroneous,

Indiana Rules of Procedure

Appellate Rule 15

(O) Certification of questions of state law from federal courts. When it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law which certificate the Supreme Court of this state, by written opinion, may answer. [As amended November 14, 1972, effective November 15, 1972; amended November 24, 1975, effective January 31, 1976; as amended April 27, 1976.]

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No. 80-1982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM E. MURRAY, individually and as Indiana Commissioner of Mental Health; J. ERIC HELMER, individually and as Superintendent of Central State Hospital; and ROBERT C. ROEDER, individually and as Indiana State Personnel Director,

Petitioners,

v.

ROSITA L. CUA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD L. DARST
1725 Market Square Center
151 N. Delaware
Indianapolis, IN 46204
Telephone: (317) 634-9100

Attorney for Respondent.

Central Publishing Company, Inc., Indianapolis, IN 46206

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether Rosita L. Cua was a "regular employee" as defined by the statute of the State of Indiana at the time of her termination from employment by the State of Indiana, which would entitle her to due process proceedings.

2. Whether the discretion of the State's personnel decision-making is unfettered.

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v.

ROSITA L. CUA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Rosita L. Cua, submits her brief in opposition to the Petition for Writ of Certiorari filed in this cause.

JURISDICTION

The judgment and order of the United States Court of Appeals for the Seventh Circuit were entered on February 20, 1981. No petition for rehearing was filed. The Proof of Service of the petitioners sent to the Supreme Court states that the petition for certiorari was mailed on May 21, 1981. The petition invokes this Court's jurisidiction under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioner's Statement Of The Case does not contain the facts material to the consideration of the questions presented, and it also contains allegations of fact which are not supported by the record. Respondent submits the following facts which are material to the questions presented and submits references to the record.

The respondent Rosita L. Cua was employed as a psychiatrist by the State of Indiana on August 4, 1972, in a "duration appointment." Transcript of Record filed in the Court of Appeals, pages 22, 31, hereinafter abbreviated to R., pp. 22, 31. The probationary period for new employees with the State of Indiana is called a "working test period" which consisted at the time of the complaint of an "original working test period" of six months and a possible extension of not more than six additional months. Indiana Personnel Board Rule 8, §8-2, Burns Indiana Admin. Rules and Regs. (4-15-2-21)-2 (Code Edition, 1976). After almost a year of employment with the State of Indiana, the Personnel Director of the Logansport State Hospital wrote to the Indiana State Personnel Division as follows:

> In reviewing the Manning Table, I notice Rosita Cua, Psychiatrist I, has not received Permanent Status although she has been employed since August, 1972. Since there is no examination for this position, and she qualifies, have we overlooked something. Should we be considering her for Permanent Status?

Plaintiff's Exhibit 9. The handwritten notation on the copy of the above memorandum in the file of the Indiana State Personnel Division reads as follows:

> Called Logansport 7-30-73. License is needed. She only has a Temp. Permit.

Plaintiff's Exhibit 9. Dr. Cua obtained temporary medical permits in 1973, 1974 and 1975. On April 8, 1976, Dr. Cua was issued a Certificate of Physician's License, limited to practice medicine in any state hospital or comprehensive mental health center within the State of Indiana. (Plaintiff's Exhibit 6).

On April 27, 1976, the Supervisor of Recruitment and Certification of the State Personnel Division wrote to the State Personnel Director as follows:

> Subject: Rosita Cua
>
> She was granted a limited license in a State mental hospital. This is a full license and does not have to be renewed as long as she continues to practice in a State hospital; per Joe O'Brien.
>
> In the past, people were issued temporary permits and they had to have them renewed on an annual basis. Therefore, we would not grant those individuals permanent status because their permits were temporary in nature. However, the limited license does not have to be renewed; therefore, it appears that we would have to give these individuals permanent status.

Plaintiff's Exhibit 18. In the margin on the right-hand side of the memorandum is the following handwritten notation:

> Call Joe O'Brien. What is she classified as? Position and employee. Logansport State Hospital.

Plaintiff's Exhibit 18. On the left-hand side of the margin is the following notation:

> Psychiatrist EI on both the position and employee side of the manning table. E20041.

Plaintiff's Exhibit 18.

On August 5, 1976, Dr. Cua wrote a letter to the State Personnel Director asking if she was classified as a "regular employee" under the State Personnel Act, and if not, the reason for not being so classified. Under the Indiana statutes and rules, a "regular employee" is a permanent employee who is provided due process rights. Indiana Code 4-15-2-33, et seq.; Rule 12, §12-5 et seq., Burns Indiana Admin. Rules and Regs. (4-15-2-32)-1 et seq. (Code Edition, 1976). A "regular employee" is defined by statute as follows:

> (n) "regular employee" means an employee who has met the minimum qualifications, passed the examination, completed the working test period and has been certified by the appointing authority for that classification.

Indiana Code 4-15-2-3(n). The same definition is in Rule 1, §1-1(Z), Burns Indiana Admin. Rules and Regs. (4-15-2-3)-1(Z) Code Edition, 1976).

As has already been quoted from Plaintiff's Exhibit 9 above, Rosita L. Cua met the minimum qualifications, and there was no examination for the position of psychiatrist. In place of an examination, the Personnel Division issued "test booklet" scores for "education and training." On August 12, 1976, the State Personnel Division completed a "Test Booklet" form showing a passing "education and training" score for Dr. Cua with an effective date of August 31, 1976. Plaintiff's Exhibit 20.

A rule of the State Personnel Board provided that time spent in a duration appointment would be credited against the required working test period. It stated as follows:

> (C) Time served in duration status which subsequently results in appointment from an employment list shall be credited against and deducted from the required working test period.

Rule 8, §8-2(C), Burns Indiana Admin. Rules and Regs. (4-15-2-21)-2(C) (Code Edition, 1976). Dr. Cua had already worked three and one-half years as a duration appointment. The State Personnel Director testified and the district court made a finding that Dr. Cua's working test period began and ended on the same day, August 31, 1976. Tr. 40, Petition Appendix, p. 11.

On October 15, 1976, Superintendent Helmer certified the appointment of Dr. Cua to the position of Psychiatrist E1 appointed from the open competitive list effective August 31, 1976, and the certification was approved by the State Personnel Director on October 21, 1976. Plaintiff's Exhibit 25. Dr. Cua was a regular employee effective August 31, 1976, since she met the minimum qualification, she had passed the examination, she had completed the working test period, and she had been certified by the appointing authority for that classification, as provided by statute.

On September 3, 1976, Dr. Cua and four other doctors requested a special meeting of the medical staff, but Dr. Cua's supervisor refused to call a meeting, eventhough the Staff By-Laws require such a meeting. R. 25, 52. On September 16, 1976, Dr. Cua's attorney wrote a letter to the Governor of the State of Indiana about Dr. Cua's supervisor. On October 14, 1976, Dr. Cua's attorney wrote another letter to the Governor about Dr. Cua's supervisor. Tr. 184-185.

On November 4, 1976, Dr. Cua's supervisor requested a three month extension of Dr. Cua's working test period, and Dr. Cua refused to sign the request because she had already completed her working test period. Plaintiff's Exhibit 28. Upon receipt of the paper request for extension, the State Personnel Division clerk automatically changed the end of the working test period card from "8-31-76" to "12-1-76".

On November 22, 1976, Dr. Cua's attorney wrote a third letter to the Governor about the supervisor. On December 3, 1976, the Supervisor requested another extension of Dr.

Cua's working test period, and Dr. Cua again refused to sign the request. Plaintiff's Exhibit 30. The State Personnel Division clerk automatically changed Dr. Cua's end of the working test period card from "12-1-76" to "2-1-77".

On January 17, 1977, the supervisor signed a statement that permanent status would not be granted to Dr. Cua, and Dr. Cua refused to sign the statement, since she already was a "regular employee". Plaintiff's Exhibit 33.

On January 18, 1977, Dr. Cua's attorney wrote to Superintendent Helmer stating that a hearing was necessary before termination, but there was no response. Plaintiff's Exhibit 35. On January 20, 1977, a notice was sent directly to Dr. Cua from the Superintendent stating that she would be dismissed effective January 31, 1977. Plaintiff's Exhibit 36.

On February 1, 1977, Dr. Cua filed this action, and the parties agreed at the pretrial conference to try the case on the sole issue of whether Dr. Cua was a "regular employee". R. pp. 34, 35, 36, 37. Under the State statute and the rules of the State Personnel Board, a "regular employee" of the State of Indiana has a right to due process proceedings before dismissal from state employment. Indiana Code 4-15-2-34; Rule 12, §12-3, Burns Indiana Admin. Rules and Regs. (4-15-2-34)-1 (Code Edition, 1976).

SUMMARY OF THE ARGUMENT

Dr. Cua completed her working test period on August 31, 1976, because she received credit against her working test period for the three and one-half years that she had worked as a duration appointment. The appointing authority certified her to the classification of Psychiatrist E1 on October 15, 1976, effective August 31, 1976, and the certification was approved by the State Personnel Director on October 21, 1976. Dr. Cua was a "regular employee" entitled to due process proceedings provided by the State statutes and rules.

ARGUMENT

I. ROSITA L. CUA WAS A "REGULAR EMPLOYEE" AS DEFINED BY THE STATUTE OF THE STATE OF INDIANA AT THE TIME OF HER TERMINATION FROM EMPLOYMENT BY THE STATE OF INDIANA, AND SHE WAS ENTITLED TO THE DUE PROCESS PROCEEDINGS PROVIDED FOR A "REGULAR EMPLOYEE."

The Petitioners have framed the Questions Presented in their Petition For Writ of Certiorari to contend that Dr. Cua had not "successfully completed the working test period" and had not "been certified for permanent merit status by the appointing authority." Petition, page i. The State Personnel Director testified and the district court found that the working test period for Dr. Cua began and ended on August 31, 1976. The petitioners have contended that the credit under the rule for time served in duration status could be credited only against the "original working test period" and not to any extension which would be required of an employee. However, the State Personnel Board's amendment of the crediting rule shortly after the State Personnel Director was served with Interrogatories in this case shows that the rule in effect during the times in the complaint was not limited to credit against the "original working test period". The 1977 amendments to the crediting rule reads as follows with the amendments emphasized:

> (C) Time spent in duration *or provisional* status, *not to exceed a period equal to the length of the original working test period,* which subsequently results in appointment from an employment list shall be

> credited against and deducted from the required working test period.

Rule 8, §8-2, Burns Admin. Rules and Regs. (4-15-2-21)-2(C) (Code Edition, 1978 Cumulative Pocket Supplement). Thus, it is clear that the rule as it existed before the amendment and during the times in the complaint gave credit for duration status against the entire "required working test period" and was not limited to the "original working test period".

There are additional reasons why the credit was not limited to the "original working test period." The State Personnel Director testified that it was impossible to interpret the crediting rule in such a limited manner and still comply with the State statute and other rules. Tr. 41, 42. For example, any extension of the working test period had to be requested with specific reasons before the end of the original working test period. Rule 8, §8-3, Burns Indiana Admin. Rules and Regs. (4-15-2-21)-3 (Code Edition 1976). Thus, if the "original working test period" has already been completed because of the credit, no extension of the working test period could be requested under the extension rule.

Petitioners emphasize the term "successfully completed his working test period" in the definition of permanent status and imply that an additional certification was required. Rule 1, §1-1(AA), Burns Admin. Rules and Regs. (4-15-2-3)-1(AA) (Code Edition 1976). No such additional certification was required during the times in the complaint.

After the complaint, and after interrogatories had been sent to the State Personnel Director, the State Personnel Board added a new rule which does require an additional approval, at least for employees coming from duration status. It reads as follows:

> *Acquisition of permanent status*—Except as provided in sections 8-2(B) and 8-2(D) [subdivisions

> (B) and (D) of (4-15-2-21)-2] of this rule, no persons shall be deemed to have permanent status unless the appointing authority has submitted a written recommendation to the director that such person be granted permanent status, and such recommendation has been approved by the director.

Rule 8, §8-4, Burns Indiana Admin. Rules and Regs. (4-14-2-21)-4 (Code Edition, 1978 Cumulative Pocket Supplement). There was no such rule during the events in the complaint. Petitioners contend that in no case could permanent status be achieved without this additional approval, but further evidence that there was no such general rule is the fact that even the new rule does not cover all cases. The new rule does not apply to reemployment appointments (subdivision (B)) or to similar position appointments (subdivision (D)). Thus, it is clear that during the events in the complaint, there was no requirement for the recommendation and approval of permanent status, over and above the statutory requirements for a "regular employee".

Petitioners contend that Dr. Cua had not been "certified for permanent merit status by the appointing authority". There was no such certification required, and petitioners are apparently referring to the recommendation and approval required by the above-quoted new rule which did not apply to Dr. Cua. The only "certification" required for "regular employee" under the statutes and rules was that he must have "been certified by the appointing authority for that classification." Indiana Code Section 4-15-2-3(n); Rule 1, §1-1(Z), Burns Indiana Admin. Rules and Regs. (4-15-2-3)-1(Z) (Code Edition, 1976). Dr. Cua was certified for the specific classification of Psychiatrist E1 on October 15, 1976, effective August 31, 1976, and the certification was approved by the State Personnel Director on October 21, 1976. No other certification was required by any statute or rule in existence at the time of Dr. Cua's employment.

That no additional certification was required by the law is shown by the Indiana Supreme Court decision of *Indiana*

State Personnel Board v. Beaumont, 247 Ind. 281, 215 N.E.2d 192 (1966). The *Beaumont* decision held that a therapist who held a position which could be filled by competitive examination and who had completed the working test period without any objection made during the working test period held permanent status.

The working test statute provides that at any time during the working test period, after the first two months thereof, the appointing authority may remove an employee without an opportunity to be heard. Indiana Code 4-15-2-21. When the working test period has been completed, and the employee becomes a "regular employee" due process proceedings are provided for by statute. Indiana Code 4-15-2-34 et. seq.

II. THE DISCRETION OF THE STATE'S PERSONNEL DECISION-MAKING IS NOT UNFETTERED, AND THE LOSS OF INCOME AND THE ADVERSE TERMINATION FROM EMPLOYMENT ADVERSELY IMPACTS UPON THE INDIVIDUAL.

Petitioners quote the statement in *Bishop v. Wood*, 426 U.S. 341, 349 (1976), that the States "may grant or withhold tenure at their unfettered discretion." Petitioners then argue that there is "unfettered discretion of State personnel decision-making." The fact that States have unfettered discretion in formulating their tenure systems does not mean that once the statutes and rules are enacted the state personnel decision-makers have unfettered discretion. Quite the contrary, the statutes and rules provide the requirements of law which must be obeyed by the personnel decision-makers.

The petitioners also argue that payment of the employee's wages would adversely impact on the State of Indiana. This is another silly argument. If there is any substantial adverse impact as a result of the actions in this case, it is the impact on the individual employee. She has

suffered the disgrace of being fired from a state mental hospital without being able to tell here side of the story, and she has lost several years of wages.

Furthermore, the State not only wrongfully terminated Dr. Cua, the State has had the power at all times to make Dr. Cua whole and has refused to do so. The longer the proceedings are drawn out, the more the damages, expenses, and fees are increased. Instead of ending the dispute peacefully and quic..ly, the State continues to drag out the proceedings with a petition for writ of certiorari mailed on the last possible day.

The petitioners filed a motion for stay of execution of the judgment in the Court of Appeals and the motion was denied. The district court had set a hearing on damages for April 24, 1981, and the hearing was continued on motion of the petitioners when they represented that they would file simultaneously with a petition for writ of certiorari a Petition for Stay of Execution. Motion for Continuance, April 22, 1981. Petitioners have not filed any such petition for stay which could be ruled on, and the parties are now left to await the ruling on the petition for writ of certiorari. All of this delay and increase in damages, expenses and fees is due to the petitioner's own actions and they can not now complain about the amount of damages which they have inflicted upon Dr. Cua.

Lastly, the petitioners may introduce evidence of the amount of income of the State of Indiana in the damages hearing on the issue of punitive damages, but evidence of financial condition of the parties does not affect the issues of liability and compensatory damages. It has always been the theory of our government and a cardinal principle of our jurisprudence that the rich and poor stand alike in courts of justice and that neither the wealth of one nor the proverty of the other shall be permitted to affect the administration of law. *Laidlaw v. Sage*, 158 N.Y. 73, 52 N.E. 679, 690 (1899).

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD L. DARST
1725 Market Square Center
151 N. Delaware
Indianapolis, IN 46204
(317) 634-9100

Attorney for Respondent